No. 13443

United States
COURT OF APPEALS
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, *Appellant*,
vs.
ALMA RAISH, *Appellee*.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon.

HONORABLE GUS J. SOLOMON, *Judge*.

KOERNER, YOUNG, MCCOLLOCH & DEZENDORF,
JOHN GORDON GEARIN,
OGLESBY H. YOUNG,
800 Pacific Building,
Portland 4, Oregon,
Attorneys for Appellant.

VERGEER & SAMUELS,
DUANE VERGEER,
HARRY F. SAMUELS,
CHARLES S. CROOKHAM,
512 Portland Trust Building,
Portland 4, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-52

TABLE OF CONTENTS

TABLE OF CASES CITED

TABLE OF STATUTES CITED

No. 13443

United States
COURT OF APPEALS
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, *Appellant,*
vs.
ALMA RAISH, *Appellee.*

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon.
HONORABLE GUS J. SOLOMON, *Judge.*

SUMMARY OF FACTS AND CONTENTIONS

Appellee adopts in general the summary of facts heretofore made in appellant's brief. Appelle does, however, wish to make the following as additional and supplemental statement of facts concerning this accident.

It should be noted from the diagram entered as plaintiff's exhibit No. 14 that there was extensive shoulder on both sides of the highway, both north and south of the underpass concerned in this accident, and that the shoulder, particularly south of the underpass, was of hard and level construction, but consisted of gravel surfacing with

considerable loose gravel thereon, and that in the underpass itself the shoulder on the westerly side of the highway was approximately 17 inches in width, and on the easterly portion was 26 inches in width, and that this shoulder was surfaced with hard packed gravel.

The evidence showed that the truck was eight feet in width; that the paved lane of the highways for vehicles travelling south was approximately eight feet, eight inches, and that for northbound traffic the paved portion was eight feet, four inches, totaling seventeen feet of highway width. For a vehicle eight feet in width travelling in the southbound lane, this would leave four inches clearance from the edge of the highway, and from the center line.

It was contended by appellant that the Los Angeles-Seattle Motor Express truck operated by Mr. Embleton was of excessive height and excessive weight, but no evidence was introduced to support either of these contentions and they were withdrawn from the jury, and this is not now claimed as error; therefore, it must be assumed that this truck was lawful in all dimensions as to the height, width and weight, and was of a common type operated upon the highways of the State of Oregon, and the operation of said authorized vehicles was known to appellant.

It should also be noticed by the pictures introduced as defendants' exhibit No. 4 that there was constructed on the westerly side of this underpass a wooden bulkhead, which bulkhead shows considerable wear and tear

presumably from the passage of traffic and vehicles which came in contact with this bulkhead, which traffic was making use of the shoulder under the underpass on the westerly side.

ANSWER TO SPECIFICATION OF ERROR NO. 1

The Court did not err in construing the covenant not to execute (Exhibit 38) as a covenant not to sue, and not as a release.

ARGUMENT

It is the position of appellee that whether the Court construes the document entered as exhibit No. 38 as a covenant not to sue, or a covenant not to execute, it was correct in construing the document as not being a release. There was clearly no intent from the face of the document on the part of appellee to release either Los Angeles-Seattle Motor Express or Southern Pacific for any action arising out of the injuries sustained by herself. While it is true that the release of one tort feasor would release all joint tort feasors, in the absence of a release of one, none are released. (Stires v. Sherwood 75 Ore. 108, 145 Pac. 645.)

In Pellett v. Sonotone Corporation, 26 Cal. (2d) 705, 160 Pac. (2d) 783, 160 A.L.R. 863, the Supreme Court of California had before it an instrument similar to the one involved in this litigation. In construing the actual affect of this type of an instrument relative to its being a release, the Court stated at page 711:

"A release has been defined as the abandonment, relinquishment or giving up of a right or claim to the person against whom it might have been demanded or enforced (Black's Law Dict.; Ballentine's Law Dict.) and its effect is to extinguish the cause of action; hence it may be pleaded as a defense to the action. A covenant not to sue, on the other hand, is not a present abandonment or relinquishment of the right or claim, but merely an agreement not to enforce an existing cause of action. It does not have the effect of extinguishing the cause of action; and while, in the case of a sole tort feasor, the covenant may be pleaded as a bar to the action in order to avoid circuity of action, a covenant not to sue one of several joint tort feasors may not be so pleaded by the covenantee, who must seek his remedy in an action for breach of the covenant. Sunset Scavenger Corp. v. Oddou, 11 Cal. App. (2d) 92, 53 P. (2d) 188; Hawber v. Raley, 92 Cal. App. 701, 704, 268 P. 943; Matthey v. Gally, 4 Cal. 62, 64, 60 Am. Dec. 595.

The document in question indicates no intent to release either party, and in the absence of an intent to release, it must be presumed that there was no release and a clear intent to pursue this claim into litigation against either or both joint tort feasors is shown thereby. We agree with counsel for appellant when they state, "The agreement does not contemplate cessation of litigation. By its execution appellee only relinquishes her right to collect any part of a judgment." (App. Br. p. 14.) There was, of course, no stated reservation of the right to sue any other wrongdoer, this not being necessary as there was no stated release of any wrongdoer insofar as litigation was concerned.

In the absence of any specific showing on the part appellant that this document was intended to releas party to this claim and to waive any right to seek ju ment against any party, there is no basis on which t document can be construed as a release.

ANSWER TO SPECIFICATION OF ERROR NO

The Court did not err in failing to give any of t instructions hereinafter referred to which were reques by appellant:

A.

"(a) Plaintiff must sustain the burden of pr against defendant by satisfactory evidence.

(b) Evidence is satisfactory only if it produ moral certainty or conviction in an unprejudi mind.

(c) Only evidence which produces such mo certainty or conviction is sufficient to justify y verdict. Any evidence less than this is insufficien

ARGUMENT

The Court, while refusing to give the specific wordi requested by appellant in relation to this instruction, in effect give the same instruction to the jury. The Co gave the following:

"The law imposes upon the party who claims th another is at fault the necessity of proving th claim by evidence. The claim must be proved n only by evidence but also by the greater weight the evidence. This is known as the preponderance the evidence. Preponderance of the evidence does n

mean the greater number of witnesses but the greater weight and the convincing character of the evidence that is introduced." (Tr. 124, 125.)

"In order to recover, plaintiff is required to prove at least one of these specifications of negligence by a preponderance of the evidence." (Tr. 125.)

Even assuming that the instructions given by the trial court were not sufficient instruction to the jury, the Supreme Court of Oregon has indicated in the case cited by appellant, Willoughby v. Driscoll, 168 Ore. 187, 120 Pac. (2d) 768, 120 Pac. (2d) 917, that failure to give this instruction did not constitute reversable error. (168 Ore. 187, 206.) Furthermore, when the instruction given contains the law requested by a party, it is not error to refuse to give the instruction verbatim as requested by the party. Marks v. Herren, 47 Ore. 603, 607, 83 Pac. 385; State v. Megorden, 49 Ore. 259, 269-271, 88 Pac. 306; Schassen v. Columbia Gorge Motor Coach System, 126 Ore. 363, 372, 270 Pac. 530.

Therefore, no error resulted to appellant by the Court's refusal to give this instruction.

B.

The trial court did not err in failing to give the following instruction requested by appellant:

"(a) Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway.

(b) I instruct you that there is no evidence to support this charge.

(c) I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case."

ARGUMENT

As noted by appellant, appellee relied principally upon Krause v. Southern Pacific, 135 Ore. 310, 295 Pac. 966 in maintaining this action under the Oregon substantive law. The Oregon Supreme Court, in reversing the order of nonsuit granted by the trial court in that case felt that under the evidence adduced, it was a question for the jury whether or not the railroad company had constructed and maintained its overpass so as to afford clearance for ordinary use of the highway.

The truck in the present case was twelve feet three inches in height, and it is undisputed that this was not an unusually high type of vehicle to be operated upon this highway through the underpass.

It is further undisputed that there was not sufficient clearance for the truck to pass through the underpass if it was to any extent off the narrow oiled road surface. It is submitted, therefore, that it is a question for the jury under the evidence in this case whether or not the overhead obstruction was insufficient to afford clearance for ordinary use of this highway. It must be noted that the word "highway" includes both shoulders, and has been variously defined by statute in Oregon as follows:

"Definitions. The following words and phrases when used in this act shall, for the purpose of this

act, have the meaning respectively ascribed to them hereinafter:

* * *

" 'Street' or 'Highway.' The entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic." (O.C.L.A. 115-401.)

"Meaning of words and phrases employed. The following words and phrases when used in this act shall, for the purposes of this act, have the meanings respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning:

* * *

"Highway. Every way or place of whatever nature open as a matter of right to the use of the public for purposes of vehicular travel. The term "highway" shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities or other institutions." (O.C.L.A. 115-201.)

Thus it is submitted that this question was properly for the jury and no error resulted in the Court's refusal to give this instruction.

C.

The Court did not err in refusing to give the following instruction requested by appellant:

"(a) Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway.

"(b) I instruct you that there is no evidence to support this charge.

"(c) I accordingly instruct you to disregard th same and you are not to consider it in your deter mination of this case."

ARGUMENT

There is no contention by the appellee in this cas that the accident would have happened had the Lo Angeles-Seattle Motor Express Truck remained upon th paved lane of southbound traffic; however, under th Oregon Rule, the truck had a reasonable right to use th shoulder as it existed appurtenant to the highway and clearly appears from the evidence that the collision re sulted from the truck using part of the shoulder an coming into collision with the overhead brace whic extended from the side of the underpass upward an over this shoulder. The use of the shoulder is an ordinar as well as lawful use of the highway. In any event th was a question for the jury.

Therefore, it is submitted that it was a proper ques tion for the jury to consider the specification of negl gence II (b) Tr. 5 which this instruction otherwise woul have removed from the consideration of the jury.

D.

The trial Court did not err in refusing to give th following instruction requested by appellant:

"(c) In connection with the charge that th truck of Los Angeles-Seattle Motor Express wa being operated without adequate or efficient brak thereon, I instruct you that there was applicable

the time and place of the accident the following statute of the State of Oregon:

"(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when, on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds. * * *

"Miles per hour	Stopping distance
10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet"

ARGUMENT

In Smith v. Pacific Northwest Public Company, et al, 146 Ore. 422, 29 Pac. (2d) 819, the Supreme Court of Oregon considered a similar instruction and the question of error in failing to give said instruction. The Court said on page 431, "The instructions requested do not embrace all of the essential elements of the terms of the brake testing statute under consideration." (To the Court see O.C.L.L. 115-376, sub (e) and sub (f). After quoting part of the statute the Court said, "It is not shown that the uneven street railway track was a proper place to test the brakes of the truck.

In the present case it is shown by uncontradicted evidence that at the time and place of the collision the

truck was partially operating on the gravelled shoulde with loose material thereon, and further that the pav ment itself was wet. Mrs. Guelda Barnhardt testifi (Tr. 56):

"Q. Do you recall the weather conditions?
A. It was raining, I believe.
Q. Was the pavement wet?
A. Yes."

Mr. Embleton stated (Tr. 74):

"Q. About how much space is there between t trucks if there are two trucks of the size of the o you were driving going through there?
A. Oh, about four inches.
Q. Four inches to spare?
A. Yes.
Q. As you mentioned, you swerved over a then there was a crunch — about how far over you think you swerved?
A. About 14 or 16 inches.
Q. Were you about that far from the yello center line?
A. Yes."

It should be noted that if the truck were swerved indicated, the wheels must have been on the should under the underpass. Mr. Follette stated (Tr. 37):

"Q. Referring to west edge of the pavement i self, was there—were there any depressions in the as you go through?
A. Just the normal edge of the highway. (6)
Q. Any mud shoulders, anything like that?
A. No, because there was no water in there, n when I got there the day after the accident. I wasn there the day of the accident, but the usual grav right in there, just the normal edge of the highwa like it would be where you are always hitting, t edge is broken like any oiled road would get."

Further, the Court will also note under the exhibits and photographs No. 4, the true condition of the shoulder surfacing of the highway under the underpass, and to the south thereof is depicted.

It is therefore submitted under the evidence in this case in the rule of the Oregon Supreme Court in Smith v. Pacific Northwest Public Service Company, supra, that the road over which the truck was then operating and upon which its wheels were located was not a proper place to test the brakes of the truck in conformance with the statute. Therefore, it was not error for the Court to refuse this instruction.

E.

The trial Court did not err in failing to give the following instruction given by appellant:

> "If you should believe from the satisfactory evidence that at the time plaintiff executed the agreement entitled "(Covenant) Not to Execute" on July 26, 1951, plaintiff did not expressly reserve the right to sue Southern Pacific Company, then in that event I instruct you that plaintiff can not recover and your verdict must be against plaintiff and in favor of defendant."

It should be noted that the statement, "The trial court erred in failing to give the following instruction *given* by appellant" as appearing on page 24 of appellant's brief, should more probably read, "The trial court erred in failing to give the following instruction *requested* by appellant.

Inasmuch as at the time this requested instruction was submitted by appellant, the Court had already ruled

as a matter of law that the document entered as exhibit No. 38 was not to be construed as a release and as being in the nature of a covenant not to sue, appellant was not entitled to have this instruction given to the jury. It should be noted that in the pre-trial order (Tr. p. 10), under issue of law the sole issue of law in the case was whether the execution by the plaintiff in the covenant not to execute constituted a release of Los Angeles-Seattle Motor Express Incorporated, and if so did such release operate to release the plaintiff's claim against the defendant.

Therefore, it is submitted that this was not a proper instruction for the jury as this was a matter of law reserved to the court by both parties under the pre-trial order, and that the Court did not err in refusing to give this requested instruction.

ANSWER TO SPECIFICATION OF ERROR NO. 3

The court did not err in giving the following instruction:

> "Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders."

The above instruction was not misleading as it defined a motorist's right to drive upon the shoulders of the roadway, and when considered with other instruction given by the court, it will be noted that the court

did not indicate that this was an unqualified or absolute right. In Transcript on page 126, the Court instructed as follows:

> "Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders.
>
> "I have stated that the defendant was bound to anticipate the ordinary use of the entire roadway and, in absence of notice to the contrary, the drivers of vehicles had a right to assume that the defendant would not maintain an obstruction to the highway which would be dangerous to those using it by ordinary means. Of course, if the danger was so obvious and apparent that persons, in the exercise of ordinary care, would have seen it, particularly drivers who had passed under it on numerous occasions would be charged with notice of it."

It should be noted from the last sentence of this instruction that if the danger were so obvious and apparent that persons seeing it would have notice of it, it must follow then that their right to drive against such obstruction would not be an absolute right in the use of the shoulders.

Oja v. LeBlanc, 185 Ore. 333, 203 Pac. (2d) 267, the Supreme Court of Oregon said the following on page 341 of the opinion:

> "If the plaintiff was standing on the shoulder when hit, that fact would present a question for the jury upon the issue of the negligence of the defendant. It is true that the driver of a motor vehicle may use his right-hand side of the highway to its

> full extent, including the shoulder "to its full extent." Zaraha v. Brandli, 162 Ore. 666, 678, 94 P (2d) 718. But, such right is of course, subject to the duty of exercise due care and to maintain reasonable control of the vehicle and a reasonable lookout for pedestrians."

It is submitted that when the instruction is construed as an entity, that the import given to the jury followed the rule of substantive law as laid down by the Supreme Court of the State of Oregon.

In considering this instruction, the court did not have before it the case of Prauss, Admx. v. Adamski, 54 Ore Adv. Sh. 803, 244 P. (2d) 598, inasmuch as this case was argued before the Supreme Court of Oregon some twelve days after this cause was submitted to the jury, and the opinion of the Supreme Court of Oregon was not handed down until the 14th day of May, 1952.

It is true that all parts of the overpass maintained over the shoulder of the highway were visible to a motorist using reasonable care, but it submitted that the motorist is entitled to use the shoulder and is not on notice that an overhead obstruction constitutes a hazard and is not as a matter of law negligent in so operating a vehicle. Therefore, it is submitted that the Court did not err in giving this instruction. We quote from Krause v. Southern Pacific Co., 135 Ore. 130 P. 317:

> "In the absence of notice to the contrary plaintiff had a right to rely upon the assumption that defendants would not maintain an obstruction to the highway which would be dangerous to those using it by ordinary means of travel. It was not

bound to anticipate the negligence of defendants unless it was of such nature as would attract the attention of a person of ordinary prudence and caution. We think it is exacting too high a degree of care to hold that plaintiff was bound to keep his eyes constantly on the direct line of travel looking for defects in the highway, which should not exist. Of course, if the danger was so obvious that a person in the exercise of ordinary care would have seen it, plaintiff would be deemed to have had notice of it. While the evidence is clear that plaintiff knew of the existence of the trestle, as he had passed under it many times, it is reasonable to infer that he had no definite knowledge as to its clearance above the pavement.

ANSWER TO SPECIFICATION OF ERROR NO. 4

The trial court did not err in withdrawing from the jury's consideration the charge that the driver of the Los Angeles-Seattle Motor Express equipment was guilty of negligence in operating the same without an adequate or proper steering mechanism.

The trial court in instructing the jury withdrew this specification of negligence from its consideration inasmuch as there was no evidence to support the charge. The only evidence introduced which might have the remotest bearing upon this question has been cited by appellant in its brief, pages 27 to 28. It should be noted that there is no evidence whatsoever contained in those statements or in the transcript which indicated that the driver of the vehicle had any trouble with his steering prior to the impact with appellant's underpass. The only

time that this occurred by his testimony was after this impact, and prior or simultaneous to the impact with the automobile in which appellee was a passenger.

The driver, Mr. Embleton, stated (Tr. p. 75):

"Q. When this crunch happened, when the upper right part of the truck collided with the crossbeam, what happened to the truck?

A. Well, it lurched to the left.

Q. Then what happened, then what did you do?

A. Well, it lurched off to the other side, it lurched to the left toward the oncoming traffic which were a car and a Greyhound Bus and some other traffic on behind, and I didn't want to hit that bus so I pulled the wheel around hard to the right and as I brought it around to the right, I noticed that there was a light tan automobile sitting there right off the edge of the road. I started to turn the steering wheel to avoid a collision with that car—I didn't have time and I saw then that I was going to hit the car and I said to myself, "I hope there isn't anybody in that car." Of course, it came up to the back end of this car and in the meantime I was still trying to bring the truck back upon the highway. Well, nothing happened, the impact of the car impaired the steering mechanism so I couldn't get it to work, and in the meantime, I thought it was funny that I wasn't slowing down at all. Later I found that (51) during the course of the time this was happening, the petcock on the airbrakes had gotten knocked off and I had no brakes."

Clearly then the Court finding no evidence to sustain this specification of negligence properly withdrew it from the consideration of the jury.

ANSWER TO SPECIFICATION OF ERROR NO. 5

The Court did not err in ruling adversely upon appellant's motion for a directed verdict and a judgment non obstante veredicto, nor for a new trial.

ARGUMENT

The questions raised by this specification of error are essentially the same questions raised by appellant in specification of error No. 2, sub (b) and sub (c). At the close of trial and upon instruction to the jury, the only allegations of negligence concerning appellant submitted to the jury were the allegations concerned with maintaining an overhead obstruction at a height insufficient for the safe passage of persons making ordinary use of the public highway, and in maintaining its overhead crossing at a width insufficient to the safe passage of persons making ordinary use of a public highway.

QUESTION OF NEGLIGENCE ON PART OF APPELLANT PROPERLY SUBMITTED TO JURY

The prime question involved herein is not whether the red truck and the vehicle of Los Angeles-Seattle Motor Express were negligent or were not negligent relative to their operation on the highway at the time the accident occurred. The essential matter is whether the appellant itself is free from any negligence which in the consideration of the jury proximately caused or contributed to the injuries of which appellee complains.

This court should take judicial notice of the fact that the vehicles involved in this accident were of a lawful height, width and weight, and that this highway, and more particularly this underpass were points on the principal arterial highway running north and south through the State of Oregon. The question then becomes one of foreseeability as to whether this railroad in operating and maintaining this overpass could reasonably anticipate that the vehicle of the height and width of the Los Angeles-Seattle equipment would have occasion to drive upon part or all of the shoulder and that in so doing would come in contact with the angle brace reducing the traversable height and width of the highway over the shoulder.

It is not evidence of lack of negligence on the part of appellant that an accident of this character and type did not occur previously. The court should take judicial notice that with increased travel on the highway, and increased carriage of motor freight, the vehicles involved in this carriage have, within legal limits, become increasingly tall and wide.

There is no contention on the part of appellant that the driver of the red truck and/or the driver of the Los Angeles-Seattle truck were not negligent in the happening in this accident. Such is not the issue and appellee was not guilty of nor charged with negligence. Therefore, it is submitted to the Court that there was sufficient satisfactory evidence from which the jury could properly return the verdict heretofore entered.

THE QUESTION OF PROXIMATE CAUSE WAS PROPERLY SUBMITTED TO THE JURY

The second ground of appellant's motion for a directed verdict was that no act or admission on its part constituted the proximate cause of the accident. Appellant also argues in support of this contention that the presence of the overpass was a mere condition as distinguished from the cause of the accident.

Under applicable laws of the State of Oregon as heretofore noted in the brief of appellant and this appellee, the rule appears firmly established in this jurisdiction as laid down by Krause vs. Southern Pacific, 135 Ore. 130, the Court ruled in that case that it was a question for the jury and not a matter of law.

Appellant cites the case of Hansen v. Bedell Company, et al, 126 Ore. 155, 268 Pac. 1020, as having enunciated its theory of proximate cause. In a later case the Supreme Court of Oregon in Stamos v. Portland Electric Power Company, et al, 128 Ore. 310 at 315, had this to say quoting an earlier case:

> "Strictly speaking there cannot be two 'proximate' causes for any injury. Where two or more circumstances each involving negligence, combine to produce an injury which, but for all of them, would not have occurred, these circumstances taken together are the cause of the injury and therefore constitute but one proximate cause."

The question of proximate cause as a matter of law is one to be found rarely, although it appears from appears from appellant's argument that it is its contention that the proximate cause as a matter of law was not

connected with negligence on its part. Foreseeable injury is, of course, a requisite of proximate cause, and proximate cause is a requisite for actionable negligence; however, "foreseeable injury" does not mean that the alleged tort feasor must be shown to have anticipated the exact form which the harm would take. In Aune v. Oregon Trunk Railway, 151 Ore. 622, 51 Pac. (2d) 663, the Supreme Court of Oregon said on page 632:

> "In order to render a party liable for the consequence of his wrongful act, it is not necessary that he should have contemplated or have been able to foresee the precise form or manner in which the plaintiff's injuries would be received.
>
> "The law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen."

and further on the same page:

> "It is utterly immaterial to limit liability when once negligence has been established. In the same note, he says: "* * * liability is to be considered, not from the probable anticipation of particular consequences, but from the probability of an injurious consequence resulting."

Applying this rule to the instant case, it is appellee's contention that in maintaining the obstruction the appellant could reasonably foresee that a motor vehicle would come in contact with the overhead knee braces, and might become disabled or temporarily rendered out of control.

The question of proximate cause as noted by appellant on page 44 of his brief "is ordinarily submitted to the jury"; and under the rule in Oregon when there is a motion for directed verdict the most favorable intention must be given to the evidence in favor of plaintiff. The trial court did not err in submitting this cause to the jury for its careful consideration.

CONCLUSION

The record in this case can but result in the following conclusions:

1. That the document executed by appellee was not a release of any claim, but in the nature of a covenant not to sue.

2. That no error prejudicial to the rights of appellants was committed by the court in instructing the jury.

3. That there was sufficient evidence of the negligence on the part of appellant which was the proximate cause of the appellee's injury to submit to the jury for its consideration.

Respectfully submitted,

VERGEER & SAMUELS
DUANE VERGEER
HARRY F. SAMUELS
CHARLES S. CROOKHAM
Attorneys for Appellee
512 Portland Trust Building
Portland, Oregon